Filed 2/6/19 In re A.O. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re A. O., A person Coming Under the Juvenile Court Law.	
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ALVARO N., Defendant and Appellant.	B290043 (Los Angeles County Super. Ct. No. CK57315C)

APPEAL from orders of the Superior Court of Los Angeles County, Rudolph A. Diaz, Judge. Affirmed.

Emery El Habiby, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary Wickham, County Counsel, Kristine P. Miles and Jessica S. Mitchell, Deputy County Counsel, for Plaintiff and Respondent.

Appellant Alvaro N., incarcerated since January 2016, brings this appeal following the termination of parental rights over his biological daughter A.O. (A.). A. was born in October 2016 with a positive toxicology screen for methamphetamine. She was removed from her mother Nancy O. (Mother) at birth, and has been in the care of her prospective adoptive parents, Mr. and Mrs. P., since she was a few days old. Mother identified another man, Edgar R., as A.'s father, and his name appeared on the birth certificate. Appellant did not come forward to suggest that he could be the girl's father until July 2017, after Edgar had been found to be the presumed father, reunification services had been terminated, and a hearing had been set under Welfare and Institutions Code section 366.26 to consider termination of parental rights.[1] After his biological connection was established, the juvenile court held a hearing to consider whether to transfer A.'s custody from Mr. and Mrs. P. to

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[1] Undesignated statutory references are to the Welfare and Institutions Code.

appellant's mother, Maria L., and concluded that remaining in her long-term placement was in the child's best interest.

On appeal, appellant contends the juvenile court erred in failing to deem him a presumed father and provide him six months of reunification services. He further contends the court abused its discretion in refusing to place A. with his mother, claiming Maria was entitled to relative preference under section 361.3. Finally, he contends the court erred in terminating his parental rights.

With respect to appellant's status and the failure to provide reunification services, we conclude that the appeal of the order finding him to be a biological father only is untimely. Moreover, appellant forfeited any claim of being a presumed father at the hearing which determined his status, and there was nothing in the record to support that he should have been deemed a presumed father or that providing him any period of reunification services would benefit A. With respect to placement, because appellant did not come forward to assert his biological connection to A. until after the reunification period had expired, the relative preference of section 361.3 was not triggered. In any event, once appellant's biological relationship was confirmed, the court provided Maria an opportunity to make her case for placement and, exercising its independent judgment, concluded that custody should remain with Mr. and Mrs. P. rather than be transferred to her. We see no basis to overturn that decision. Nor is there a basis to overturn the

order terminating parental rights. Accordingly, we affirm the court's orders.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Detention and Reunification Period*

After A. was born testing positive for methamphetamine, Mother admitted using methamphetamine and marijuana during the pregnancy and tested positive for both those substances.[2] Mother and Edgar, who was with Mother at the hospital and identified by both parties as A.'s father, gave consent to the Department of Children and Family Services (DCFS) for A. to be detained.[3] Both Mother and Edgar asked that Edgar's mother be considered for placement. DCFS immediately began an assessment of Edgar's mother, but rejected her due to a history with DCFS, including "a substantiated referral for severe neglect."

Neither Mother nor Edgar appeared at the October 20, 2016 detention hearing. The court ordered A. detained in shelter care. She was placed with foster parents, Mr. and Mrs. P., when she was five days old.

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[2] Mother had a long history of substance abuse, which led to her two older children becoming dependents of the court. Parental rights over the oldest child were terminated prior to the initiation of the underlying proceeding.

[3] At the time of A.'s detention, Edgar had a criminal record that included an arrest for sodomy of a minor and multiple arrests for possession of narcotics for sale. His two older children were the subjects of dependency proceedings.

Prior to the jurisdictional hearing, Mother told the caseworker she had been with Edgar since August 2015. Edgar signed a JV-505 Statement Regarding Parentage form, claiming A. as his child, and Mother executed under penalty of perjury a parentage questionnaire form, stating that she believed Edgar was A.'s father and denying she had been living with anyone else at the time of the conception.[4] On November 2, 2016, the court found Edgar to be the presumed father.

At the December 1, 2016 jurisdictional hearing, the court found true that A. was born with a positive toxicology for methamphetamine, that Mother and Edgar had histories of substance abuse and were current substance abusers, that Edgar and the mother of his older children had a history of engaging in domestic violence, and that Edgar had a history of perpetrating sexual abuse.

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[4] In addition, Mother and Edgar had undertaken the steps necessary to place Edgar's name on the birth certificate. (See Health & Saf. Code, § 102425 [prohibiting naming man not married to the mother as the father on a birth certificate unless both the mother and the man sign voluntary declaration of paternity form]; Fam. Code, § 7574 [voluntary declaration of paternity form must include signatures of both mother and named father, and statement by mother that man who cosigned the form is "the only possible father"]; *In re Raphael P.* (2002) 97 Cal.App.4th 716, 737-738 [court may presume from presence of man's name on birth certificate that voluntary declaration of paternity form was completed and signed by both parents].)

Neither Mother nor Edgar appeared at the December 14, 2016 dispositional hearing. The court ordered reunification services for Edgar, although he had not kept in contact with DCFS or made himself available for an interview. Due to her history with her older children, Mother was not provided reunification services.[5]

On December 29, 2016, the caseworker received a call from Maria L., who stated that she believed appellant was A.'s father and that she was the paternal grandmother. Maria told the caseworker that she wanted to take care of A. The caseworker told her to go to court and speak with A.'s attorney.[6]

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[5] Reunification services need not be provided for a parent in a new proceeding where the court previously ordered the termination of reunification services for any sibling, and the parent has not made subsequent reasonable efforts to treat the problems that led to the removal of the sibling; where parental rights over any sibling have been permanently severed and the parent has not made subsequent reasonable efforts to treat the problems that led to the removal of the sibling; and/or where the parent has a history of extensive, abusive and chronic drug or alcohol use and has resisted prior court-ordered treatment during the three-year period prior to the new proceeding. (§ 361.5, subd. (b)(10), (11) & (13).)

[6] The caseworker did not inform the court of this conversation or include a discussion of it in any of the reports. The court did not learn of it until the custody hearing that took place in May 2018, when the delivered service logs were introduced into evidence. At a hearing on December 13, 2017, A.'s attorney said she had been contacted "early in the case" by Maria, but did not provide a date. Counsel also stated that
(*Fn. is continued on the next page.*)

In April 2017, the court referred A. to the Regional Center for an evaluation and appointed her foster parents as the holders of education rights.[7] The evaluators concluded A. showed signs of developmental delay. She started regular sessions with a physical therapist and began making progress.

In June 2017, the caseworker reported that A. was comfortable in the home of Mr. and Mrs. P. and was bonded to them. The caseworker observed "a loving and secure attachment between the child and caregiver[s]." Mr. and Mrs. P. reported they wished to adopt A. Edgar had failed to comply with the court-ordered programs or to keep in contact with DCFS. Neither Mother nor Edgar had made any attempt to visit A. Neither Mother nor Edgar appeared at the June 14, 2017 six-month review hearing, where Edgar's reunification services were terminated and the court set a section 366.26 hearing for October 16, 2017 and a progress hearing for July 13, 2017.

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paternal relatives, in particular Maria and appellant's sister, had come to "many hearings."

[7] The Regional Center is a private nonprofit community-based organization which contracts with the State Department of Developmental Services to coordinate services for individuals with developmental disabilities. (See *Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 486; *Arce v. Kaiser Foundation Health Plan, Inc*. (2010) 181 Cal.App.4th 471, 479, fn. 3.)

B. *Determination of Appellant's Status and Termination of Parental Rights*

In a last-minute information for the court filed just before the July 13, 2017 progress hearing, the caseworker reported that on June 27, Maria had called, claiming to be A.'s paternal grandmother and expressing the desire to adopt the child. Maria claimed that Mother and appellant had lived together from October 2015 until January 2016, but that Mother was also in a relationship with Edgar during part of that time. Maria said she had confronted Mother after the June 14 review hearing, and Mother had told her appellant was the father.

Just prior to the July 13 progress hearing, appellant wrote to the court. The letter stated he believed he was the father of "Ileen V." Appellant requested a paternity test and asked that Maria be given custody "[i]f [he did] happen to be the father . . . ." Appellant enclosed a completed parental questionnaire form but had not responded affirmatively to any of the key questions, including whether he was present at the child's birth, had signed the birth certificate, was married to the child's mother, or received the child into his home.

At the July 13, 2017 progress hearing, the court instructed DCFS to arrange a DNA test for appellant.[8] In

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[8] At the same hearing, Mr. and Mrs. P. submitted a de facto parent request, which the court granted. By the time of the progress hearing, Edgar was incarcerated. Shortly thereafter, Mother's whereabouts became unknown.

August, the caseworker reported that the testing lab needed a court order appointing an expert. The order was issued in October 2017.[9] Both the caseworker and the lab reported having difficulty obtaining a sample from appellant due to his imprisonment. At the end of July, appellant wrote to the caseworker, stating he had been living with Mother in Maria's home from September 2015 to January 2016, and that Mother had told him she was pregnant prior to his imprisonment. Appellant further stated that his family and friends had kept him updated about the pregnancy and birth. He again requested a DNA test.

Appellant appeared at a September 11, 2017 hearing, represented by appointed counsel. The court issued an order reaffirming that Edgar was A.'s presumed father. The order made no finding with respect to appellant's relationship with A. It stated that appellant had been provided notice of the section 366.26 hearing, which was reset for November 8. It contained the following language: "[DCFS] is ordered to: [¶] Provide Family Reunification services to the minor and parents or guardians."

In the section 366.26 report, DCFS recommended adoption as the permanent plan. The report stated that Mr. and Mrs. P. had demonstrated they were committed to adopting A., genuinely loved A. and had provided exceptional

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[9] In the meantime, samples were obtained from A. and Edgar. After testing, Edgar was ruled out as the biological father.

care. A hearing took place on November 8, but the court concluded nothing further could be resolved until it obtained the results of the DNA test. The section 366.26 hearing was continued to December 13. At the end of November, the testing lab issued its report, concluding with 99.99 percent certainty that appellant was A.'s biological father.

At the December 13, 2017 hearing, the parties discussed the paternity test results. Counsel for DCFS and appellant asked the court to find that appellant was the biological father. Appellant's counsel stated: "He would like to be presumed, but in my review of the file, I don't see a legal basis to request that." The court found appellant to be the biological father and agreed "there is no legal basis to find him presumed." Appellant's counsel requested that Maria be considered for placement. A.'s counsel stated that although she believed consideration of Maria's home was required, she did not believe A. should be moved. The court agreed Maria's home should be assessed. Appellant's counsel contended that notice of the section 366.26 hearing was not proper as to him. The court served appellant with notice in court, and continued the section 366.26 hearing to March 14, 2018.

In December 2017, the caseworker inspected Maria's two-bedroom home, where she lived with her husband and two teen-age children. There were no issues with the home, which was clean and appropriately stocked with food. DCFS did not, however, undertake a criminal background check, and continued to recommend adoption by Mr. and Mrs. P., as

did A.'s counsel. At a January 22, 2018 progress hearing, counsel for appellant asked the court to delay any decision concerning placement until DCFS had completed its assessment of Maria's home. The court stated that it was inclined to deny the request for transfer of placement, observing that A. was "strongly bonded with her current caretakers" and had "no bond with [appellant's] relatives," but agreed to delay its final decision.[10] By March 14, the criminal background check of Maria and her family had yet to be completed. The court continued all placement and section 366.26 issues to April 30, emphasizing that even if DCFS completed the criminal background check and concluded Maria's home was appropriate, "it doesn't mean it's in the best interest of the child to be placed with [appellant's] relatives."

At the April 30, 2018 hearing, the criminal background check was still incomplete, requiring the placement issue to be put off. Appellant's and Mother's counsel asked the court to continue the section 366.26 hearing, contending there would be no need to terminate if custody were transferred to Maria and she agreed to a guardianship. Appellant's counsel expressed concern that terminating parental rights would leave him with no standing at the custody hearing. The court denied the request and proceeded with the section

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[10] Maria and her family had a visit with A. in February 2018. This appears to be the only contact appellant's family had with the girl.

366.26 hearing. No evidence was presented. In argument, counsel for DCFS contended there was no basis to choose any plan other than termination of parental rights and adoption by Mr. and Mrs. P., as none of the statutory exceptions applied. A.'s counsel agreed. Appellant's counsel asked that the court consider a permanent plan of guardianship in conjunction with transferring custody to Maria. She did not contend that any of the statutory exceptions to termination applied. The court terminated parental rights for "anyone . . .who claims to be a parent [to A.]," finding that A. was adoptable and that no statutory exception applied. The court stated that appellant would be allowed to participate at the custody hearing "unless someone has an objection." No objection was raised.

C. *Custody Hearing*

On May 9, 2018, the court held a hearing to consider transfer of custody to Maria. Mr. and Mrs. P. presented a letter from A.'s physical therapist. The therapist said that A. had made "steady developmental gains" and "significant, ongoing progress in the five developmental domains," including "cognition, fine motor and expressive communication." She gave credit to Mr. and Mrs. P. for asking appropriate question, incorporating the therapist's suggestions into A.'s daily care, and updating the therapist about A's progress with texts and videos.

Appellant called his sister, Daniela N., and Maria. They attempted a hospital visit, but when they arrived, A.

had already been released. Daniela and Maria went to a DCFS office a week later, and spoke to someone who gave them the name of the caseworker and the date of the next hearing. Thereafter, she and Maria attended all the hearings, including the one where Edgar was found to be the presumed father. They did not speak or attempt to intervene in court, but talked to A.'s counsel on more than one occasion, stating that they were sure appellant was A.'s father. Daniela believed that Maria spoke to the caseworker and asked for custody of A., but was not present during that conversation.

Maria testified she was aware Mother had become pregnant when Mother and appellant were living in her home. She learned about the birth from a friend. She tried to visit at the hospital, but did not know that Mother had been registered under Edgar's name. A hospital social worker advised Maria to contact DCFS. In October 2016, Maria spoke to someone in a DCFS office, who told her to go to the next hearing. Maria also spoke directly with the caseworker and requested placement, but was unclear as to the date she first spoke to the caseworker or the date she made the request for custody. At some point, the caseworker told her appellant needed to send a letter requesting a DNA test to establish the relationship, and Maria made sure that was done.

Appellant's counsel contended Maria was entitled to placement preference because she was a relative who came forward prior to the disposition, requesting placement. She

faulted DCFS for failing to take seriously Maria's request for placement when she first came forward. Counsel for Mother joined. Counsel for Mr. and Mrs. P. contended no weight should be given to Mother's preference due to her actions in misleading the court and the parties about the identity of A.'s father. She contended the statutory preference for relative placement was no longer a factor due to the late stage of the proceedings. She further contended that even if it applied, the court could, after consideration of the appropriate factors, choose a different caretaker based on the best interest of the child, and that due to A.'s bond with Mr. and Mrs. P., transfer of custody could not be in the child's best interest. A.'s counsel agreed, pointing out that no one from appellant's family had protested when Edgar was found to be the presumed father. She contended the court could reasonably conclude that the first contact between any of appellant's relatives and the caseworker requesting placement was in December 2016, the date of the conversation recorded in the delivered service log. Counsel for DCFS agreed there was no issue of relative preference as there had been no "serious attempt to request . . . placement" until June 2017, and that A. should not be transferred to Maria, as Mr. and Mrs. P. had developed the knowledge to meet A.'s special needs and it was not in her best interest to be placed with "a stranger."

Before issuing its ruling, the court reiterated the facts: Mother had submitted a declaration under penalty of perjury that Edgar was the father. Edgar was present at the birth,

his name was on the birth certificate, and he held himself out as the father to his relatives and friends. The court had moved forward with the understanding that Edgar was the father and provided Edgar with reunification services. Appellant's first letter was not received until July 2017, after reunification services had been terminated. Thereafter, it took some time to ascertain the truth of his claim to be the biological father. In the meantime, A. had been with Mr. and Mrs. P. since she was five days old, and knew no other parent. Mr. and Mrs. P. had provided for her every day and had attended to her special needs. The paternal relatives, on the other hand, had no bond or relationship with the child other than biological. The court found that remaining in placement with Mr. and Mrs. P. was in A.'s best interest. Appellant noticed an appeal of the order terminating parental rights, the order denying placement with Maria, and "all other orders of the court" on May 9, 2018.

DISCUSSION

A. *Appellant's Status and Reunification Services*

The dependency scheme distinguishes between alleged, biological and presumed fathers. (*In re Jovanni B.* (2013) 221 Cal.App.4th 1482, 1488.) A biological father is one who has established his relationship to the child by blood. (*Ibid.*) A presumed father is one who """"promptly comes forward and demonstrates a full commitment to . . . paternal responsibilities -- emotional, financial, and otherwise."""""

(*Ibid*.) A man whose paternity has neither been established nor presumed is referred to as alleged father. (*Bianka M. v. Superior Court* (2018) 5 Cal.5th 1004, 1016.) Presumed fathers are accorded greater rights in dependency, including the right to at least six months of reunification services. (*In re Jovanni B.*, *supra*, 221 Cal.App.4th at p. 1488; § 361.5, subd. (a).) A biological father may receive reunification services, but only if the court finds that granting him services would benefit the child. (*In re Elijah V.* (2005) 127 Cal.App.4th 576, 589; § 361.5, subd. (a).) An alleged father is not entitled to reunification services. (*In re Paul H.* (2003) 111 Cal.App.4th 753, 760; *Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570, 586.) Indeed, it is often said that an alleged father's rights are limited to appearing and attempting to change his paternity status. (See, e.g., *In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1120.)

Appellant seeks to contest the court's determination of his status -- which occurred at the December 13, 2017 hearing, more than five months before his notice of appeal was filed on May 9, 2018 -- and the failure to provide six months of reunification services. He contends we should disregard any question of timeliness because the court failed to advise him that he should seek review by filing a petition for an extraordinary writ after it "terminated" his reunification services on December 13. (See *In re Rashad B.* (1999) 76 Cal.App.4th 442, 448 [where court fails to advise parent of his or her right to seek writ review of an order terminating reunification services and setting a section

366.26 hearing, claims of error relating to provision of reunification services are cognizable on appeal from order terminating parental rights].)

Appellant's contention that he was provided reunification services that were terminated December 13, 2017 is not supported by the record. The language he relies on to suggest that reunification services were offered -- the court's September 11, 2017 order stating that DCFS was to provide family reunification services to the minor and her "parents or guardians" -- was not applicable to appellant, as this was the first hearing at which appellant appeared after the court learned of his claim to be the biological father and the court had made no finding that appellant was anything other than an alleged father. Further proof that the court did not intend by anything said in the September 11 order to provide reunification services to appellant lies in the fact that the court did not issue a case plan describing the reunification program appellant was to complete, DCFS did not include any discussion of a reunification plan for appellant in any of its reports, neither the court nor any party discussed reunification services for appellant at any hearing, and there is no order in the record terminating such plan. Thus, we can only conclude that the language in the September 11 order was a clerical mistake.[11]

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[11] Appellant's claim that the court's December 13, 2017 order terminated his reunification services is equally unsupported. Nothing in the December 13 order or reporter's transcript suggests that the court believed appellant had been provided
(*Fn. is continued on the next page.*)

Even were we to conclude that an appeal of the court's finding concerning appellant's status was timely, we would have no basis to reverse it. Appellant's counsel forfeited any right to change his status to presumed father when she stated at the December 13 hearing that she saw no legal basis for making such finding. (See *Adoption of Arthur M.* (2007) 149 Cal.App.4th 704, 719 [father's stipulation at trial that he was not a presumed father barred him from advancing the issue on appeal].) Moreover, counsel was correct. Appellant understood that Mother was pregnant at the time of his incarceration in January 2016, and knew that she had given birth in October 2016. Yet he did nothing to alert the court or DCFS of his potential relationship with A. "While under normal circumstances a [biological] father may wait months or years before inquiring into the existence of any children that may have resulted from his sexual encounters with a woman, a child in the dependency system requires a more time-critical response. Once a child is placed in that system, the father's failure to ascertain the child's existence and develop a parental relationship with

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reunification services or mentions termination of reunification services for appellant or any other party. Appellant contends that the order must be construed as an order terminating reunification services because it "set[] the section 366.26 hearing." The section 366.26 hearing was set at the June 14, 2017 six-month review hearing. Thereafter, the court continued it multiple times, including on December 13. We ascribe no special meaning to the December 13 continuance.

that child must necessarily occur at the risk of ultimately losing any 'opportunity to develop that biological connection into a full and enduring relationship.'" (*In re Zacharia D.* (1993) 6 Cal.4th 435, 452 (*Zacharia D.*), quoting *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 838; see *Adoption of Arthur M., supra,* at pp. 719-720 [unwed father's constitutional right to develop parental relationship with his child is inchoate and does not ripen """unless he proves that he has 'promptly come[] forward and demonstrate[d] a full commitment to his parental responsibilities"""; such father cannot compensate for his failure to promptly come forward by "'attempting to assume his parental responsibilities many months after learning of the pregnancy"'], italics omitted.)

The Supreme Court held in *Zacharia D.* that if a man fails to achieve presumed father status in a dependency matter prior to the expiration of the reunification period, his sole remedy is to file a motion to modify under section 388. (*Zacharia D., supra,* 6 Cal.4th at pp. 453, 454-455; see *In re Vincent M.* (2008) 161 Cal.App.4th 943, 956 ["As a biological father who did not assert paternity until the case was in permanency planning, [appellant's] 'only remedy' was to show, under section 388, that [the minor's] best interest required vacating the permanency planning orders and providing [appellant] reunification services so that he might qualify as a presumed father, entitled to custody."].) Here, appellant made no such motion and nothing in the record warranted changing his status. He had no relationship with A., he had failed to come forward when he learned of her

birth, and he had allowed Edgar to hold the title of presumed father without objection throughout the reunification period. Under these circumstances, there was no realistic possibility he could have been found to be the presumed father, even had his attorney asserted such claim.

B. *Custody*

Appellant contends the court abused its discretion in denying Maria's request for transfer of custody. He further contends that Maria was entitled to the relative preference set forth in section 361.3, and that the court was required to apply the criteria of section 361.3, subdivision (a) in evaluating Maria's request.[12] For the reasons discussed, we disagree.

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[12] "'Relative'" is defined as "an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words 'great,' 'great-great,' or 'grand,' or the spouse of any of these persons even if the marriage was terminated by death or dissolution." (§ 361.3, subd. (c)(2).) Section 361.3, subdivision (a) sets forth eight factors the agency and the court are to consider when determining whether relative placement is appropriate: (1) "[t]he best interest of the child"; (2) "the wishes of the parent, relative, and child, if appropriate;" (3) the Family Code provisions regarding relative placement; (4) "[p]lacement of siblings and half-siblings in the same home, unless that placement is found to be contrary to the safety and well-being of any of the siblings"; (5) "[t]he good moral character of the relative and any other adult living in the home"; (6) "[t]he

(*Fn. is continued on the next page.*)

1. *Standing*

Preliminarily, we address respondent's contention that appellant lacks standing. Ordinarily, a parent whose parental rights have been terminated loses standing to object to placement decisions. (*In re K.C.* (2011) 52 Cal.4th 231, 235-237 (*K.C.*).) However, as the Supreme Court explained in *K.C.*, "[a] parent's appeal from a judgment terminating parental rights confers standing to appeal an order concerning the dependent child's placement . . . if the placement order's reversal advances the parent's argument against terminating parental rights." (*Id.* at p. 238.) In reaching that conclusion, the court cited with approval *In re H.G.* (2006) 146 Cal.App.4th 1 (*H.G.*) and *In re Esperanza C.* (2008) 165 Cal.App.4th 1042 (*Esperanza C.*). In *H.G.*, the juvenile court removed a dependent child from her grandparents' custody. (*H.G.*, *supra*, at pp. 7-8.) In *Esperanza C.*, the court denied a relative's request for

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nature and duration of the relationship between the child and relative, and the relative's desire to care for, and to provide legal permanency for, the child if reunification is unsuccessful"; (7) the relative's ability to provide "a safe, secure and stable environment for the child," "[e]xercise proper and effective care and control of the child," "[p]rovide a home and necessities of life for the child," "[p]rotect the child from his or her parents," "[f]acilitate court-ordered reunification efforts, visitation with other relatives" and "implementation of all elements of the case plan," "[p]rovide legal permanence for the child if reunification fails," and "[a]rrange for appropriate and safe child care, as necessary"; and (8) "[t]he safety of the relative's home."

placement. (*Esperanza C.*, *supra*, at p. 1051.) In both cases, the juvenile courts terminated parental rights shortly after rendering their placement decisions. (*H.G.*, *supra*, at pp.8-9; *Esperanza C.*, *supra*, at p. 1052.) In both cases, the Courts of Appeal held that because a placement decision has the potential to alter the court's determination of the appropriate permanent plan for the child, possibly leading the court to choose an alternative to adoption, the parents had standing to appeal the placement decision. (*H.G.*, *supra*, at pp. 9-10; *Esperanza C.*, *supra*, at pp. 1053-1054.) In both cases, the parents challenged both the custody order and the order terminating parental rights. (*H.G.*, *supra*, at p. 18; *Esperanza C.*, *supra*, at p. 1061.)

Here, appellant's counsel argued that Maria had been unfairly denied relative preference, and that the court should place A. with her in a guardianship rather than terminate parental rights and free A. for adoption. (See § 366.26, subd. (c)(1)(A) [court may choose long term guardianship rather than adoption for child living with relatives under certain circumstances].) In addition, on appeal he challenges the order terminating parental rights. Accordingly, we "construe[] liberally" appellant's standing to appeal, resolve doubts in his favor, and conclude he has standing.[13] (See *K.C.*, *supra*, 52 Cal.4th at p. 236.)

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[13] We note that the court permitted appellant to present evidence and argument in favor of the transfer of custody at the hearing without objection by any party. Respondent raises standing for the first time on appeal.

2. *Applicability of Relative Preference*

Turning to the merits, section 361.3 provides that "[i]n any case in which a child is removed from the physical custody of his or her parents . . . , preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative . . . ." (§ 361.3, subd. (a).) "'[P]referential consideration'" under the statute means that "'the relative seeking placement shall be the first placement to be considered and investigated,'" but does not guarantee placement. (*Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1033 (*Cesar V.*).) The statutory preference applies up to the time of the dispositional hearing and becomes relevant thereafter only when "a new placement of the child must be made . . . ." (§ 361.3, subd. (d); see e.g., *In re M.H.* (2018) 21 Cal.App.5th 1296, 1303.)

According to the caseworker's log, Maria first contacted her seeking custody on December 29, 2016 -- after the dispositional hearing. Thus, her request came too late. Appellant points to the evidence indicating that Maria had spoken to others -- the hospital social worker, A.'s counsel and an unidentified person in a DCFS office -- at earlier points in time. It was not clear whether Maria affirmatively sought custody during those encounters, but even had she done so and informed the court and caseworker of her desire, there was no basis for preferential placement under section 361.3. At that time, appellant was, at best, an alleged father. He did not come forward seeking to establish his biological tie with A. until many more months had passed.

Moreover, when appellant belatedly contacted the court and the caseworker, he asked not for custody for himself or Maria or immediate recognition as the father, but for a DNA test. As appellant himself was not sure of the relationship, there was no reason for the court or the caseworker to treat Maria as a blood relative entitled to preference. Accordingly, section 361.3 was not triggered.

We find support for our determination in *In re E.G.* (2009) 170 Cal.App.4th 1530, where the court held that "until biological parentage is established, an alleged father's claim of Indian heritage does not trigger the requirements of ICWA [the Indian Child Welfare Act] notice" to the tribes of which the child may be a member. (*In re E.G., supra,* at p. 1532.) The court explained: "ICWA defines 'Indian child' as 'any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. [Citation.] The necessity of a biological tie to the tribe is underlined by the ICWA definition of a 'parent' as 'any biological parent or parents of an Indian child . . . .' [Citation.] [¶] An alleged father may or may not have any biological connection to the child. . . . [A]bsent a biological connection the child cannot claim Indian heritage through the alleged father." (*Id.* at p. 1533; accord, *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1166, fn. 5.)

Similarly, as pertinent here, section 361.3 defines "[r]elative" as "an adult who is related to the child by blood."

(§ 361.3, subd. (c)(2).) When Maria first initiated inquiries about A., appellant's biological connection to the girl was uncertain, and he had taken no steps to establish it, although he was aware of the child's birth and the DCFS proceedings. As his sister and mother were attending the hearings, he must also have been aware that Edgar had come forward, claimed A. as his child, and been found to be the presumed father. Yet he did nothing to establish his biological connection to A. until July 2017. Absent proof of such connection, neither DCFS nor the court was required to view Maria as a blood relative entitled to preference under the statute.

Appellant cites *In re R.T.* (2015) 232 Cal.App.4th 1284 (*R.T.*) and *In re Isabella G.* (2016) 246 Cal.App.4th 708 (*Isabella G.*) for the proposition that the juvenile court may be required to apply the relative preference long after the dispositional hearing. In *R.T.*, the agency placed a newborn minor with a nonrelated extended family member, although the presumed father had identified two paternal aunts who wished to be considered for placement. (*R.T., supra,* at pp. 1292-1293.) The proceedings moved quickly because the parents had failed to reunite with an older child and no reunification services were offered. At the dispositional hearing, the court ordered a permanent plan of placement with the extended family member. (*Id.* at p. 1293.) The agency thereafter refused to consider moving the child, although he was only three months old when the aunts' homes were approved, and the court denied a section 388

petition filed by the aunts. (*Id.* at pp. 1293-1294.) The Court of Appeal concluded that because the relatives "invoked the preference before the dispositional hearing," the agency and the court "failed to apply it at disposition," and "the error was timely raised by a section 388 motion," the juvenile court should have "directed the agency to evaluate the relatives for placement under the relevant standards [citation] and, upon receipt of the evaluation and the agency's placement recommendation, exercised its independent judgment to consider if relative placement was appropriate . . . ." (*Id.* at p. 1300, italics omitted.)

Isabella G. is similar. There, the parents of the presumed father (the child's paternal grandparents) sought custody immediately after the detention. The agency failed even to assess their home, and compounded its error by falsely informing the grandparents that there was a mandatory one-year waiting period before the child could be moved from the foster family with whom she had been placed. (*Isabella G.*, *supra,* 246 Cal.App.4th at pp. 713-714.) After being repeatedly rebuffed in their efforts to obtain custody, the grandparents hired a lawyer, who filed a section 388 petition after the hearing at which reunification services were terminated. (*Isabella G, supra,* at p. 715.) The appellate court concluded the situation was indistinguishable in any significant respect from *R.T.*, and that although the section 388 petition was filed long after disposition, the grandparents were entitled to a hearing at which the juvenile court was required to apply the factors set

forth in section 361.3, subdivision (a) rather than a "'generalized best interest unguided by the relevant statutory criteria.'" (*Isabella G,* at pp. 722, 724.)

R.T. and *Isabella* are readily distinguishable. The persons seeking custody there were related to presumed fathers, clearly meeting the definition of "relative" under the statute. The relatives sought custody prior to the disposition. Additionally, they wanted immediate custody, not a DNA test to determine whether a blood connection existed. Further, the children were sufficiently young and had been in their placements for a sufficiently short period of time that transfer to the relatives would not have interfered with any significant bond. Here, in contrast, by the time appellant's connection to A. was established and Maria unambiguously sought custody, A., then 14 months old, had developed a bond with Mr. and Mrs. P., and it was too late to trigger the section 361.3 preference.

As the 361.3 relative preference did not apply, the juvenile court was free to consider Maria's request for custody under the ordinary rules. Typically in dependency cases, the agency makes placement decisions and the juvenile court reviews such decisions for abuse of discretion. (See *Cesar V.*, *supra*, 91 Cal.App.4th at pp. 1033-1034; *Department of Social Services v. Superior Court* (1997) 58 Cal.App.4th 721, 731-734.) In a hearing on a typical motion for change of placement, "the burden of proof is on the moving party to show by a preponderance of the evidence that there is new evidence or that there are changed

circumstances that make a change of placement in the best interest of the child." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) Here, the juvenile court applied an enhanced standard of review, exercising its independent judgment in reviewing the agency's decision concerning A.'s placement.[14] Our review of the juvenile court's grant or denial of a motion to modify a dependent child's placement is for abuse of discretion. (*In re Stephanie M.*, *supra*, at p. 318.)

The evidence appellant presented at the custody hearing was directed to convincing the court to apply the relative preference and the criteria of section 361.3, subdivision (a). Appellant presented no evidence to support a determination that new circumstances and A.'s best interest required a change of placement. By their own admission, his relatives had no relationship with the girl and little knowledge of the special services she needed, whereas Mr. and Mrs. P. had cared for A. virtually her entire life, ensuring she received needed services and therapy for her disabilities. There was no dispute that A. was strongly bonded to Mr. and Mrs. P. and they with her and that appellant's relatives were strangers to the girl. Under these circumstances, the juvenile court did not abuse its discretion

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[14] Because the court independently reviewed DCFS's decision to leave custody with Mr. and Mrs. P., we need not consider appellant's contention that the court abused its discretion in terminating parental rights in April 2018 without "independently evaluating the paternal grandparents as a possible relative placement for [A.]."

in concluding A.'s best interest lay with the existing custody arrangement and adoption by Mr. and Mrs. P.

C. *Termination of Parental Rights*

When the section 366.26 hearing is held, the juvenile court may (1) terminate parental rights and order that the child be placed for adoption; (2) appoint a long-term legal guardian; or (3) order long-term foster care. (§ 366.26, subd. (b); *In re Celine R.* (2003) 31 Cal.4th 45, 53.) If the court determines by clear and convincing evidence that it is likely the child will be adopted, the court "shall terminate parental rights and order the child placed for adoption" (§ 366.26, subd. (c)(1)), unless one of the statutory exceptions applies and "provides a compelling reason for finding that termination of parental rights would be detrimental to the child." (*In re Celine R.*, *supra,* at p. 53.) Termination of parental rights to free the child for adoption is the "'first choice'" because "'"it gives the child the best chance at [a full] emotional commitment from a responsible caretaker."'" (*In re C.B.* (2010) 190 Cal.App.4th 102, 122.) Section 366.26, subdivision (c)(1)(B)(i), provides an exception, precluding termination of parental rights where "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

Appellant's brief asserts that the parental bond exception to termination of parental rights applied. Appellant has no bond with A.; he has been in prison all of A.'s life and has had no contact whatsoever with the girl.

Moreover, the section 366.26, subdivision (c)(1)(B)(i) exception is not available to a biological father who has never sought or obtained presumed father status. (*In re A.S.* (2009) 180 Cal.App.4th 351, 362; *In re Ninfa S.* (1998) 62 Cal.App.4th 808, 811; see also *In re Jason J.* (2009) 175 Cal.App.4th 922, 933-934 [The rights of a "'mere biological father . . . may be terminated based solely upon the child's best interest and without any requirement for a finding of detriment or unfitness . . . .' [Citations.]"].)

In any event, appellant forfeited any contention with respect to the alleged parental bond. The only argument he raised in opposition to the termination of parental rights at the section 366.26 hearing was his contention that if custody were given to Maria, the court should consider guardianship instead of adoption. As we have affirmed the court's decision to leave custody of A. with her prospective adoptive parents, there is no basis to reverse the order terminating parental rights.

DISPOSITION

The court's orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, P. J.

We concur:

WILLHITE, J.

DUNNING, J.*

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*Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.